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IN THE

Supreme Court of the United States

October Term, 1965
No. 539

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

SAMUEL B. STEWART,
ROBERT H. FABIAN,
ALFRED T. TWIGG,
650 South Spring Street,
Los Angeles, Calif. 90014,
Attorneys for Petitioner.

WILLIAM D. DONNELLY,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Petitioner, Bank of America National Trust and Savings Association prays that this Court grant rehearing of its Order of November 22, 1965 denying the petition for a Writ of Certiorari and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case as prayed for in the petition filed September 7, 1965 herein.

Reasons for Granting Rehearing and Issuing the Writ.

The argument of the government in the instant case is gutted by a decision published after the petition and the briefs were filed herein. We refer to the case of *United States v. National Bank of Commerce* (U.S. Dist. Ct., East Dist. La. Oct. 15, 1965) 65-2 USTC Par. 9720. A copy of the opinion as it appears in the

Advance Sheets, Standard Federal Tax Reports (Commerce Clearing House) is appended hereto. At time of printing of this Petition for Rehearing, the case was not yet officially reported.[1]

The Louisiana District Court decision repudiates the government's contention that the civil law "compensation" does not apply to bank deposits. A major premise in the government's Brief in Opposition (Br. 8), based upon a student comment in the Tulane Law Review, is that the principle of "compensation", derived from the civil law, does not apply to bank deposits. Quite to the contrary is the Court's ruling in *National Bank of Commerce*.[2] There the Court, Ainsworth J., was concerned with a Louisiana "compensation" statute similar to Sec. 440 of the California Code of Civil Procedure. The statute, Article 2207, LSA-Revised Civil Code, reads in pertinent part as follows:

> "When two persons are indebted to each other, there takes place between them a compensation that extinguishes both the debts, in the manner and cases hereafter expressed."[3]

A notice of federal tax lien had been filed and a levy made upon the bank. The Court applied the "compen-

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[1]The decision did not come to the attention of counsel for Petitioner until November 19, 1965. A letter to the Clerk apparently arrived too late to be considered by the Court in acting on our Petition, denied November 22, 1965. As appears from the attached opinion an attorney from the Tax Division, Department of Justice participated in the case, and the decision was entered October 15, 1965, 13 days before the government filed its brief herein.

[2]Of course, a forty-year California Supreme Court decision is also to the contrary. *Arnold v. San Ramon Valley Bank*, 184 Cal. 632, 194 Pac. 1012 (1921).

[3]The self-operating feature of the Louisiana Statute is fully recognized in *Arkansas Natural Gas Corporation v. Sartor*, 98 F. 2d 527 (5th Cir. 1938).

sation" statute of Louisiana to find the bank's deposit obligations discharged and concluded the bank therefore held no property or right to property when the levy was made. In addition, resting upon the foregoing statute it distinguished the rule of *Bank of Nevada v. U.S.*, 251 F. 2d 820 (9th Cir. 1957), as inapplicable where the statutory principle of "compensation" (in Louisiana, as in California derived from the civil law) has at the time of levy already extinguished the taxpayer's property right by operation of law. Thus, stated the court:

> "While the foregoing reasons are sufficient to decide this case, we find that the bank's plea of compensation (setoff) is likewise well taken. The United States, relying on *Bank of Nevada v. United States,* 9 Cir. 1958, [58-1 USTC Par. 9228], 251 F. 2d 820, cert. den., 356 U.S. 938, 78 S. Ct. 780 (1958), contends that NBC did not exercise its right of setoff until after the government's levy was served on it. *Bank of Nevada* is inapplicable to the facts here because Louisiana law does not require exercise of setoff, but it occurs through 'compensation' by operation of law. The claim of the United States in *Bank of Nevada, supra,* was based on an agreement which gave the bank the option of setoff under certain specified contingencies.
>
> "In Louisiana, the claim of setoff is treated in civilian terminology as 'compensation.' Compensation is defined in Article 2207, LSA-Revised Civil Code:
>
> 'When two persons are indebted to each other, there takes place between them a compensation that extinguishes both the debts, in the manner and cases hereafter expressed.'

"Compensation occurs in Louisiana by the mere operation of law even unknown to the debtors. See Article 2208, LSA-Revised Civil Code. Therefore, even if we treated the payrolll and general accounts as to entirely separate accounts the defendant would still prevail under the Louisiana provisions for legal compensation, and the credit in one account would be extinguished by the overdraft debit in the other."[4]

So likewise, Sec. 440 of the California Code of Civil Procedure is a self-operating "compensation" statute.[5]

The Court, in *National Bank of Commerce,* recognizes that there is no magic in the word "setoff" and that if the decisions of this Court are to be given any weight, the threshold question requires a determination of the effect of the "compensation" (offset) statute of the state where the transaction has occurred. Thus, concluded the Court:

"*Bank of Nevada, supra,* was based on the court's rejection of the bank's contention that as a 'general rule' a bank has a 'general lien' upon deposits. There is no inchoate agreement here, nor is the defendant, NBC, claiming a general lien under some elusive general rule. The bank asserts a legal right afforded to it by virtue of law and it was not necessary for it to do some positive act in order to protect this right, for as we have seen in Louisiana Civil Code Article 2208, legal compensation takes place 'even unknown to the parties.' "

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[4]It is not impertinent to note that this decision was written by a judge thoroughly familiar with state law. Judge Ainsworth was in the active practice of law in Louisiana for thirty years before his appointment in 1961.

[5]*Jones v. Mortimer,* 28 Cal. 2d 627, 170 P. 2d 893 (1946); *Hauger v. Gates,* 42 Cal. 2d 752, 269 P. 2d 609 (1954).

There is thus a conflict between the two courts as to the applicability of *Bank of Nevada* where a state statute provides for automatic "compensation," offset, and discharge of bank liability to the taxpayer. *National Bank of Commerce* underlines the need for an authoritative decision by the Supreme Court on the effect of state "compensation" laws on Sec. 6332 levies. We are not dealing with isolated transactions. Federal tax lien levies on bank accounts are everyday occurrences. The Ninth Circuit in the instant case rested upon *Bank of Nevada*—a case which has nothing to do with Sec. 440 of the California Code of Civil Procedure or any other "compensation" statute.[6] In effect, therefore, the Ninth Circuit, contrary to *National Bank of Commerce* and decisions in other Circuits, is saying that the property and property right decisions of the Supreme Court relative to federal tax liens do not apply to bank accounts. Surely, California banks should not be subjected to such discrimination. Justice and the need for uniformity dictates that the matter should be settled by the Supreme Court.

We know this Court does not sit to correct mere error. But this Court has repeatedly held assertion of a section 6332 levy penalty to require determination, *in limine,* and as matter of state law, whether the defendant held "property" of the taxpayer at the time of the levy.

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[6]The government's brief significantly ventures no forthright reliance on *Bank of Nevada* to support the Ninth Circuit's decision here involved. Instead, it seeks by allusion, to "recording" of lien and "[f]unds subject to liens" (Br. in Opp., pp. 7, 9) to confuse the issue as one of "priority", thus lightly skipping over the "threshold" question: Whether the bank was "in possession of * * * property or rights to property upon which a levy has been made." (Sec. 6332).

If this Court's decisions are to be other than academic for the future, then this Court must continue to exercise its supervisory powers when, as here, a lower court fails to give even formal consideration to state court decisions establishing the effect of the state law.

Conclusion.

For the reasons set forth above and in the Petition for a Writ of Certiorari. it is respectfully urged that rehearing be granted and that a Writ of Certiorari issue to the Court of Appeals for the Ninth Circuit to review the judgment below or in the alternative to vacate and remand for a more careful determination of the property rights of the petitioner and the taxpayer-depositor under the applicable state law.[7]

Respectfully submitted,

SAMUEL B. STEWART,
ROBERT H. FABIAN,
ALFRED T. TWIGG,
Attorneys for Petitioner.

WILLIAM D. DONNELLY,
Of Counsel.

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[7]A further alternative is to defer action on this petition for rehearing until time for appeal in the *National Bank of Commerce* case has expired; and, if appeal is timely noted, until decision on appeal, thus preserving petitioner's rights if this Court insists on conflict of circuits. *Cf. Stone v. White,* 296 U.S. 550; 298 U.S. 646; 299 U.S. 622; 300 U.S. 643; 301 U.S. 532.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

ROBERT H. FABIAN,
Counsel for Petitioner.

APPENDIX.

[¶9720] United States of America, Plaintiff v. National Bank of Commerce, Defendant.

U. S. District Court, East. Dist. La., New Orleans Div., No. 15250, Civil Action Division, 10/15/65.

[1954 Code Sec. 6323]

Lien for taxes: Bank deposits: Property.—Where a taxpayer maintained two accounts with a bank, one of which was overdrawn in excess of the amount in the second account, the bank held no property of the taxpayer upon which the Government could levy for taxes. Back reference: ¶5362.032.

Sherin V. Reynolds, Tax Division, Department of Justice, Washington, D. C. 20530, Louis C. LaCour, United States Attorney, Ernest N. Morial, Assistant United States Attorney, New Orleans, La., for plaintiff. Louis C. Guidry, 920 National Bank of Commerce Bldg., New Orleans, La., for defendant.

Ainsworth, District Judge: This case involves a claim by the United States against the National Bank of Commerce (hereafter called NBC) for judgment against the defendant in the sum of $814.79 for the latter's refusal to honor an Internal Revenue tax levy served upon it, against funds of one of its customers claimed to be on deposit in the bank.

Both parties have moved for summary judgment under Rule 56, Fed. R. Civ. P., and there is no genuine issue as to any material fact. These motions are before us for determination.

On September 20, 1963 plaintiff made assessments against the Quality Construction Company, Inc. (here-

after called taxpayer) for corporation income taxes due for taxable periods in 1959 and 1960 for $7,062.26 and $337.74, respectively. On the same date plaintiff demanded payment from taxpayer who failed to pay.

On February 4, 1964 a notice of tax lien relative to the assessment was filed with the Clerk of Court in Jefferson Parish, Louisiana, taxpayer's domicile. On February 7, 1964 a notice of levy together with a copy of the tax lien were served by plaintiff on NBC, in which bank taxpayer maintained a general account and a payroll account. At that time taxpayer's payroll account showed a credit of $814.79, but the general account was overdrawn $1,516.94. The defendant bank contends that the credit in the payroll account was subject to the overdraft of $1,516.94 in the general account and therefore the bank was not in possession of any property belonging to the taxpayer.

Plaintiff contends that on the date of the service of its tax levy on the bank, the bank possessed funds belonging to the taxpayer in the amount of $814.79, which is subject to its lien. (See 26 U. S. C. A. § 6332.)

The bank's position in essence is that the general and payroll accounts of the taxpayer, Quality Construction Company, are in fact one account; that for the convenience of its corporate customers such as Quality, it maintains two accounts. This banking practice is verified by the affidavit of the manager of NBC's branch office where taxpayer maintained its account.[1] There-

[1]Mr. Belloni, the manager, states in his affidavit:
"That in order to facilitate the handling of payrolls by some of the customers of the Bank, it is usual to have the customer open two separate accounts, one known as the General Account, and the other as the Payroll Account. That it is possible for one of the accounts to become overdrawn through various reasons

fore, if the two accounts are maintained merely for the customer's convenience, and are treated as one account for banking purposes, the operation of debiting or crediting either account against the other is merely a bookkeeping transaction. The overdraft in one account merely represents a debit to be made in the second account. The entire transaction is handled as if both accounts represented the debit and credit columns of a single account. Accordingly, when the levy was served upon the defendant the taxpayer's net account showed a credit of $814.79 and a debit of $1,516.94, which means that there was a deficit in the account and the taxpayer was actually indebted to the bank for $702.15, the net overdraft. Thus, the bank is correct that it did not possess any property or rights to property subject to the government's levy.[2]

While the foregoing reasons are sufficient to decide this case, we find that the bank's plea of com-

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and such overdrafts approved for payment upon consideration of the balance in the other account and the merit of the principals involved. Especially is this true where the persons authorized to sign on each account are the same persons as was the case in this instance."

[2]The debit against the payroll account was not made until February 21, 1964, after the tax levy was made against the bank. However, this delay is explained by Mr. Belloni in his affidavit. On the date the levy was served a deposit was made by taxpayer consisting of two checks for $10,212.48 and $45.44, respectively. This was on Friday, and there was no clearing date until the following Monday, February 10, 1964, at which time the check for $10,212.48 was returned because it had not been properly signed by the drawer. The bank waited before making its debit entry to the payroll account; believing that taxpayer would procure the proper signatures and redeposit the check. However, by February 21, 1964 the affiant was convinced that the taxpayer did not intend to cover the overdraft in the general account by redepositing the $10,212.48 check. Affiant then authorized the debit to the payroll account and credit to othe general account for $814.79.

pensation (setoff) is likewise well taken. The United States, relying on *Bank of Nevada v. United States,* 9 Cir. 1958, [58-1 USTC Par. 9228], 251 F. 2d 820, cert. den., 356 U.S. 938, 78 S. Ct. 780 (1958), contends that NBC did not exercise its right of setoff until after the government's levy was served on it. *Bank of Nevada* is inapplicable to the facts here because Louisiana law does not require exercise of setoff, but it occurs through "compensation" by operation of law. The claim of the United States in *Bank of Nevada, supra,* was based on an agreement which gave the bank the option of setoff under certain specified contingencies.

In Louisiana, the claim of setoff is treated in civilian terminology as "compensation." Compensation is defined in Article 2207, LSA-Revised Civil Code:

> "When two persons are indebted to each other, there takes place between them a compensation that extinguishes both the debts, in the manner and cases hereafter expressed."

Compensation occurs in Louisiana by the mere operation of law even unknown to the debtors. See Article 2208, LSA-Revised Civil Code. Therefore, even if we treated the payroll and general accounts as two entirely separate accounts the defendant would still prevail under the Louisiana provisions for legal compensation, and the credit in one account would be extinguished by the overdraft debit in the other.

Bank of Nevada, supra, was based on the court's rejection of the bank's contention that as a "general rule" a bank has a "general lien" upon deposits. There is no inchoate agreement here, nor is the defendant,

NBC, claiming a general lien under some elusive general rule. The bank asserts a legal right afforded to it by virtue of law and it was not necessary for it to do some positive act in order to perfect this right, for as we have seen in Louisiana Civil Code Article 2208, legal compensation takes place "even unknown to the parties."

We hold that whether the accounts herein are treated separately or as a single account, defendant must prevail. There is no genuine issue of material fact and defendant is entitled to judgment in its favor as a matter of law.

Decree accordingly.

END